Once a foreign country is placed on the priority list, the President is directed to establish specific negotiating objectives for the country drawn from a list of twelve objectives set forth in the statute. 19 U.S.C. §§ 3104(b)-(d). These specific objectives include obtaining "national treatment for telecommunications products and services that are provided by [the] United States" as well as "access to the basic telecommunications network[s] in foreign countries on reasonable and nondiscriminatory terms and conditions * * * for the provision of value-added services by United States suppliers." 19 U.S.C. §§ 3104(d)(1), (10). The President is also directed to enter into negotiations with countries placed on the priority list by USTR. 19 U.S.C. § 3104(a). The statute permits the President to modify the negotiating objectives for various reasons, but requires such changes to be reported to Congress. 19 U.S.C. § 3104(b)(2).

The statute also sets forth procedures that must be followed if agreement is not reached with a country that has been placed on the priority list. 19 U.S.C. § 3105. It authorizes the President to take a variety of responsive and retaliatory actions, including the imposition of countervailing duties and other measures. 19 U.S.C. § 3105(b). It also provides for compensation to a foreign country if the President's action is later found to be "inconsistent with the international obligations of the United States," including under the GATT. 19 U.S.C. § 3107.

The statute directs USTR annually to review all agreements entered into pursuant to the statute, as well as "every other trade agreement regarding telecommunications products or services that is in force with respect to the United States." 19 U.S.C. § 3106(a)(1)(B). In conducting that review, USTR must determine whether any "act, policy, or practice of the foreign country" that is a party to a telecommunications trade agreement either violates the agreement or "otherwise denies, within the context of the terms of such agreement, to telecommunications products and services of the United States firms mutually advantageous market opportunities in that foreign country." 19 U.S.C. § 3106(a)(2). In making these determinations, USTR is directed to consider certain factors and to consult with the United States International Trade Commission. 19 U.S.C. § 3106(b). If USTR finds that an agreement has been violated, it can take retaliatory action. 19 U.S.C. § 3106(c). If USTR decides to impose penalties under 19 U.S.C. § 301, the penalties shall be in the form of "those actions which most directly affect trade in telecommunications products and services" with the country in question, "unless the Trade Representative determines that actions against other economic sectors would be more effective in achieving compliance." 19 U.S.C. § 3106(c)(2).[10]

As the foregoing makes plain, the 1988 Act created a detailed and comprehensive scheme for handling bilateral trade issues in the telecommunications sector. The foregoing also indicates that Congress already articulated policies and procedures that wholly encompass those proposed by the NPRM. Yet, instead of delegating this authority to the FCC, Congress directed that negotiations be conducted by the Executive Branch. And it directed the USTR and the President to consider the very same factors that the Commission is proposing to weigh under its "effective market access" test. The Commission's initiative is inconsistent with the entire scheme for handling trade issues relating to telecommunications that Congress has prescribed.

Indeed, it is readily apparent that in passing the 1988 Act Congress was aware of, <u>and rejected</u>, the FCC's desire to assume a broader role in telecommunications trade issues. A provision of the Act makes express reference to the Commissions <u>Regulatory Policies and International Telecommunications</u> proceedings, in which the Commission was considering whether to take on such a role and perhaps require reciprocity of foreign countries. See 19

[10] The statute directs the President to engage in interagency consultation in taking any action pursuant to the delegated authority. 19 U.S.C. § 3108. It also directs USTR to solicit the views of the private sector, and to keep Congress apprised of negotiations and actions under the statute.

U.S.C. § 3109. Even more significant, Congress considered but rejected a provision that would have "specifie[d] that in making decisions on the basis of the public interest, convenience, and necessity, the FCC should, where appropriate, take into account the impact of international trade on the ability of the U.S. telecommunications industry to be competitive in the international marketplace and on the ability of the American public to obtain quality services and equipment." H. Conf. Rep. No. 576, 100th Cong., 2d Sess. 658-59, reprinted in 1988 U.S.C.C.A.N. 1547, 1691-92. The final version of the legislation, however, relegated the FCC to the role of collecting data for submission to Congress and of conducting (along with USTR and the Commerce Secretary) a study on telecommunications competitiveness in the United States for submission to Congress. 19 U.S.C. §§ 3109(a), 3110. The House Conference Report accompanying the final version of the bill went out of its way to note that "[t]he requirement that the FCC submit * * * certain data * * * should not be interpreted as suggesting that the FCC has any legal authority to formulate trade policy." H. Conf. Rep. No. 576, at 659 (emphasis added), reprinted in 1988 U.S.C.C.A.N. at 1692.

Congress's decision to limit the Commission to an information-gathering and advisory role thus was no accident. Congress obviously desired a coherent and unified approach by the Executive Branch's trade professionals to issues such as foreign market access and reciprocity requirements. The Commission's proposed "effective market access" test upsets the careful balance struck by Congress and is flatly inconsistent with Congress's design.

II. THE "EFFECTIVE MARKET ACCESS" TEST WILL NOT ACHIEVE ITS INTENDED PURPOSES AND SHOULD BE REJECTED

Even if the Commission could impose an "effective market access" test on foreign countries, it should decline to do so. The Commission requests comment on whether its "proposals * * * or other alternatives will best serve [its] goals." NPRM ¶ 5. DT believes that the Commission's overarching goal of enhancing competition in the market for global services and thereby benefiting U.S. consumers will be disserved by the "effective market access" test. Rather than raising new barriers to foreign entry and investment, the Commission should encourage foreign entry and investment while continuing to review transactions on a case-by-case basis to ensure that adequate safeguards are in place to guard against anticompetitive conduct.

A. The Commission's Stated Goals And Their Interrelationship

The Commission articulates three goals. First, in keeping with its "procompetitive * * * regulatory policy" in this and other areas, the Commission desires to "promote effective competition in the global market for communications services." NPRM ¶ 1, 21, 26.[11] Greater competition, the NPRM explains, will have the salutary effect of "achiev[ing] for U.S. consumers reduced rates, increased quality, and new innovative services, including the availability of global communications services." NPRM ¶ 27. It will also bring greater "opportunit[ies] for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness." Ibid. The objective of enhancing competition "in the global market for communications services" is the "primary goal" of this proceeding.

The NPRM also sets forth two subsidiary goals: (a) "[t]o prevent anticompetitive conduct in the provision of international services or facilities", and (b)"[t]o encourage foreign governments to open their communications markets". NPRM ¶ 26. According to the NPRM, both of these "other two goals are necessary to reach th[e] first goal" of enhanced global competition. NPRM ¶ 27 (emphasis added). DT fully agrees that prevention of anticompetitive

[11] As previously explained (at pp. 10-12), DT is skeptical that the Commission possesses broad power to regulate the "global market," as opposed to the narrower subject of communications and transmission between the United States and foreign countries.

conduct is a "necessary step" in "obtaining effective competition." NPRM ¶ 28. Indeed, until now the Commission has relied exclusively on such safeguards against anticompetitive conduct to ensure full and fair competition. NPRM ¶¶ 10-14.

What is new in this proceeding is the Commission's second subsidiary goal: to encourage foreign governments to open their communications markets. As an initial matter, DT questions whether this is truly "necessary" to achieve the overriding objective of "promot[ing] effective competition in the global market for communications services." NPRM ¶ 1, 26 (emphasis added). If safeguards are fully capable of preventing anticompetitive conduct — an assumption that the Commission previously has acted upon and is nowhere refuted in the NPRM — then it is difficult to see why effective (as opposed to perfect or ideal) competition in the global market for communications services hinges upon the opening foreign markets. In other words, if (as DT believes) safeguards imposed by the Commission on foreign carriers or their U.S. affiliates under Section 310(b)(4) or Section 214 are sufficient to control risks of discrimination, cross-subsidization, unfair disclosure of competitors' information and the like, then foreign carriers participating in the U.S. market will be unable, in the global communications market, to leverage their market power at home to gain unfair advantages or to disadvantage competitors.[12]

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[12] Indeed, this conclusion is borne out by the Commission's decision not to apply an effective market access test in situations where "a U.S. carrier acquires an ownership interest in a foreign carrier." NPRM ¶ 50. In that circumstance, the Commission is confident that its "dominant carrier" regulation and other safeguards can ensure effective competition in the market for global services, even if the foreign carrier in which an ownership stake is acquired holds "a monopoly" in the foreign country. Ibid. Compare Regulation of International Common Carrier Services, 7 FCC Rcd 7331, 7331 ¶ 3 (1992) ("[T]he need to ensure nondiscriminatory treatment of U.S. carriers in foreign markets applies equally to those markets where a U.S.-owned company acquires telecommunications facilities and services" as it does where a foreign company obtains an ownership stake in a U.S. carrier) (emphasis added).

Even more important, the means proposed by the Commission to achieve its subsidiary goal of opening foreign markets — erecting barriers to entry by new foreign competitors, and restricting the influx of foreign capital — is counterproductive to the Commission's principal goal of promoting competition. It is a basic fact of economic life that barriers to entry stifle competition in the barricaded market. See NPRM ¶ 1 ("[A]llowing foreign carrier entry into the U.S. international services market will * * * provid[e] additional competition that will benefit consumers."); id. ¶ 60 (noting need to avoid "discourag[ing] pro-competitive foreign investment"). Fewer competitors means higher rates, lower quality, and fewer innovative services — exactly the opposite of what the Commission is hoping to achieve in this proceeding. See NPRM ¶ 27.

The same detrimental effects on competition occur when restrictions are placed on foreign investment falling short of "entry." Such restrictions prevent smaller competitors in the U.S. market from obtaining additional capital needed to strengthen their operations and thereby further catalyze competition.[13] Perhaps nowhere is this more true than in the telecommunications sector, where market participants are facing the prospect of substantial and expensive upgrades to critical infrastructure, including the laying of extensive new fiber optic cable. As one of the government's top antitrust regulators recently observed, such technological innovation is a major driving force behind increasing competition in the telecommunications

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[13] Needless to say, adoption of an effective market access test (inapplicable to non-equity arrangements) would impose an entry barrier benefitting AT&T more than any other U.S. carrier. AT&T is extremely large and does not have the same needs for new capital as its smaller U.S. competitors. Its global reach (already accomplished by its WorldPartners' alliance) will be favored to the detriment of AT&T's much smaller competitors if it is exempted, as proposed, as a non-equity alliance from any effective market access requirement. This will only spur more foreign carriers to enter the AT&T alliance. DT submits that these developments will undercut rather than enhance the Commission's principal goal in this proceeding — promoting competition in the market for global services.

markets.[14] The process of technological innovation and infrastructure investment will only be slowed by new limits on foreign investment. And the ultimate loser will be the U.S. consumer in terms of higher prices, poorer quality of services, and so on.[15]

Partly to avoid such adverse effects, the Commission has twice rejected calls to impose foreign ownership restrictions analogous to those found in Section 310 on cable television operators.[16] In the First Cable Foreign Ownership Order, the Commission explained:

> [C]itizenship prohibitions may in some measure deter the development of cable television in the United States. Although it is hoped that the industry will continue to find sources of domestic capital to fund its growth, it remains at this time relatively undeveloped and in need of new sources of capital and technology to continue its development. Foreign investment, if permitted, could contribute to this development. The Commission, we believe, ought not to deny these resources to cable without overriding reasons of national importance. In the absence of demonstrable harm and where benefits may result, the Commission is inclined to allow free market forces to determine the direction of capital flow within the industry.

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14 Statement of Ann K. Bingaman, Assistant Attorney General, Antitrust Division, Hearings Before the Committee on Commerce, United States Senate, Concerning Telecommunications Reform Legislation, at 11 (March 2, 1995); see also Testimony of Scott Blake Harris, Chief of the International Bureau, Federal Communications Commission, on Foreign Ownership Restrictions, Hearings Before the Committee on Commerce, Science and Transportation, United States Senate, at 5 (March 21, 1995) ("Section 310 may unnecessarily impede U.S. companies' ability to attract investment, and thus develop global strategies.").

15 As the NPRM itself elsewhere acknowledges, moreover, "cooperative arrangements between firms in 'vertical' situations" usually "create efficiencies and are consistent with antitrust principles." NPRM n.48. Not only does the Commission's market access test harm competition by thwarting new entrants, but it also prevents existing U.S. carriers from gaining the benefits of vertical integration.

16 See Report and Order, Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and For Grant of Station Licenses in the Cable Television Relay Service, 59 F.C.C. 2d 723 (1976) ("First Cable Foreign Ownership Order"); Memorandum Opinion and Order, Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and For Grant of Station Licenses in the Cable Television Relay Service, 77 F.C.C. 2d 73 (1980) ("Second Cable Foreign Ownership Order").

59 F.C.C. 2d at 727 (emphasis added). Four years later, in 1980, the Commission again refused to erect barriers to foreign investment and ownership in cable (including a requirement of reciprocity). "[S]uch a restriction," the Commission explained, "would merely promote the self interest of the domestic cable television industry at the expense of additional competitive alternatives for the public in the franchising process." Second Cable Foreign Ownership Order, 77 F.C.C. 2d at 80 (emphasis added); see also id. at 81 ("To the extent regulation is sought merely to preserve franchise opportunities for U.S. companies and eliminate foreign competition we fail to see how such regulation would benefit cable subscribers or the public generally.") (emphasis added). Although the telephone industry in the United States is not "relatively undeveloped" as the cable industry was in 1976, the fact remains that significant capital investments in infrastructure and technology are needed to build the information superhighway of the future. DT submits that the Commission's observations in its cable proceedings apply with equal force here.

In proposing new entry barriers, the Commission's unarticulated assumption is that the immediate and continuing loss[17] in competition and in technological innovation caused by the new barriers will, in the longer term, be offset by increases in competition resulting from the liberalization of foreign markets. Notably, however, the Commission provides no factual basis for (and indeed makes no attempt to defend) this critical assumption. See Second Cable Foreign

[17] DT assumes that the proposed policy, if implemented, would result in the denial of permission to some foreign carriers to enter the U.S. market or to make new investments in U.S. carriers. For reasons set forth below (at pp. 33-36), DT believes that at least in some cases, the Commission's approach will cause other countries not only to refuse to open their markets but also to retaliate by erecting new barriers to U.S. investment. In any event, the Commission's implementation of the highly ambiguous, multi-factored approach proposed in this rulemaking (see pp. 30-32, infra) would chill efforts by foreign entities to make new investments in United States carriers and their infrastructure, regardless of how foreign governments react to the FCC's new policy.

Ownership Order, 77 F.C.C. 2d at 80 (declining to impose reciprocity requirement on cable ownership where there was "no showing in this proceeding that a reciprocal agreement would improve communications service available in the United States") (emphasis added). As next explained, this assumption is incorrect: the Commission's approach will not, in the long run, open foreign markets or lead to greater competition in the market for global services.

B. The Commission's "Effective Market Access" Test Is Likely To Be Ineffectual In Opening Foreign Markets

The Commission's proposed approach will be effective only if it succeeds in opening to competition foreign markets that would otherwise have remained closed. Unless that outcome is achieved, the policy will fail because it will result only in blocking new entrants and new investments, which will harm competition. For several reasons, however, the "effective market access" test proposed by in the NPRM is unlikely to open foreign markets that otherwise would have remained closed.[18]

First, in some instances a foreign government that has kept its telecommunications markets closed (or opened them more slowly than the Commission deems acceptable) will decide that its various political and economic reasons for adhering to that policy outweigh any economic benefits that would accrue to the foreign telecommunications carrier or entity seeking to enter the U.S. market.[19] This is particularly true if the definition of "affiliation" adopted by the

[18] In the absence of evidence affirmatively showing that a rule of reciprocity would in fact be effective in opening up foreign markets, moreover, the Commission in the past has wisely declined to adopt such measures. See Second Cable Foreign Ownership Order, 77 F.C.C. 2d at 79 (declining to impose reciprocity rule on foreign owners of cable operators where Commission was "not in a position to know if such a policy on our part would in fact have the intended result or, to the contrary, it would lead to increasing trade barriers in other areas").

[19] Of course, the Commission's approach will have no impact on the markets of those countries with domestic telecommunications companies that do not wish to enter the U.S. market. See Senate action sets alarm bells ringing for telecom negotiators, Financial Times, Mar. 29, 1995, at 6 ("Trade officials argue that [a] reciprocity provision is also unlikely to provide much

Commission were to include equity investments falling short of control (e.g., 10% or even 25% ownership). See NPRM ¶¶ 59-61. In that event, the benefit to the foreign carrier resulting from a small ownership stake — which will not necessarily translate into an equal benefit to the foreign government — is likely to pale in comparison to the political and economic factors driving the foreign government's initial decision to keep its market closed. This is especially true because no foreign government is willing to be perceived as "buckling under" to pressure by the United States.

Second, as is often the case with governmental intrusion in international transactions, the FCC may end up outmaneuvered by the market. Foreign carriers and investors would be able to avoid the "effective market access" requirement altogether by structuring a joint venture or investment in non-equity terms. This loophole would be available because "non-equity business relationships between carriers" (such as AT&T's WorldPartners Company) would not give rise to an "affiliation" triggering the application of the "effective market access" standard. NPRM ¶¶ 62-63. Although DT takes issue below with this exception and its rationale (see pp. 58-61, infra), for present purposes it is sufficient to note that in some and perhaps many cases it will be possible for a foreign carrier to restructure its joint venture with a U.S. carrier in non-equity terms falling short of control and thereby to evade application of the "effective market access" requirement.[20]

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leverage over Japan and other Asian countries, whose telecommunications markets Washington is keen to open, because no telecommunications companies in these countries want to set up operations in the US.").

[20] It would be difficult, to say the least, for AT&T to dispute this point in view of the position it recently took before the D.C. Circuit in the Royalty/Funding appeal. See United States v. Western Electric Co., 12 F.3d 225 (D.C. Cir. 1993) (holding that term "affiliated enterprise" in MFJ includes non-equity arrangement between a Bell Operating Company (BOC) and another entity under which BOC funds development of product by the entity and shares directly in the entity's revenues derived from product's sales). In Royalty/Funding, AT&T took the categorical

Third, the Commission's approach provides insufficient assurance to foreign governments that they will be rewarded if they open their markets to competition. The "effective market access" consideration is embedded in a flexible, multi-factor, and open-ended test. The NPRM proposes a complicated, two-step process under which the Commission would first determine whether there is "effective market access" — "either currently or in the near future" — in the "primary market" of a foreign carrier seeking entry, so that U.S. carriers are permitted to "provide basic, international telecommunications facilities-based services." NPRM ¶ 40. In making this assessment, the Commission would examine six different factors:

> (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States;
>
> (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices, including cost allocation rules to prevent cross-subsidization;
>
> (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services;
>
> (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities;
>
> (5) the protection of carrier and customer proprietary information; and
>
> (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.

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position that "'anything that can be accomplished by ownership' of two firms in vertical markets 'can also be accomplished by a properly drawn contract' between the two firms." Br. of Defendant-Appellee American Telephone and Telegraph Co. at 27, United States v. Western Electric Co., No. 92-5079 (emphasis added) (quoting F. Easterbrook and R. Posner, Antitrust 869 (2d ed. 1981)). Accord Royalty/Funding, 12 F.3d at 233.

NPRM ¶ 40. These factors contain significant ambiguities.[21] In addition, none "would be dispositive" on the issue of "effective market access" or be necessary to a finding of that such access exists. Ibid. The precise weight to be given to each factor may vary from case to case. See ibid. ("[W]e will look to the arguments of the applicant and commenting parties as to the appropriate weight of each factor in a particular market."). In light of the foregoing, a foreign government would find it exceedingly difficult to determine how to ensure that the FCC will conclude that the foreign market permits "effective access." The only way to guarantee such a finding would be to satisfy all of the foregoing factors.

Even that extraordinary accommodation by a foreign government, however, would not ensure FCC approval. This is so because there is a second stage to the Commission's inquiry in which the finding of "effective market access" would be balanced with five other "public interest factors" that "might weigh in favor of, or against, allowing entry into the U.S. market." NPRM ¶ 45. Those factors include: (1) "the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers"; (2) "the status of the foreign carrier as a government or non-government entity"; (3) "the general significance of the proposed entry to promotion of competition in global markets"; (4) "the presence of cost-based accounting rates"; and (5) "any national security implications." NPRM ¶ 45. As the NPRM makes clear, the Commission's assessment of these additional factors might lead it to deny permission to a foreign carrier (or its affiliate) to enter the U.S. market or to make a substantial investment in a U.S. carrier even when the Commission has found that

[21] For example, how is a foreign government to know whether the FCC ultimately will conclude that a foreign regulator's procedures to enforce competitive safeguards are "fair" (factor 6), that the international facilities-based services that U.S. carriers can offer in the foreign market are "substantially similar" to those that the foreign carrier can offer in the U.S. (factor 1), or that the foreign country's competitive safeguards are sufficient to protect against anticompetitive or discriminatory conduct (factor 2)?

"effective market access" exists. NPRM ¶ 41 ("We also believe that there are times when public interest factors other than comparable market access might be decisive on the issue of entry."). And as if this uncertainty were not enough, the Commission — not surprisingly in view of the obvious foreign and trade policy implications of its proposed rule (see pp. 13-22, supra) — would also "solicit the views of the Executive Branch on [a] foreign carrier's entry into the U.S. market." Id. ¶ 45. This suggests that there may be occasions when the Executive Branch's recommendation will override the result yielded by the FCC's complicated balancing process.

In sum, the NPRM provides foreign governments with little assurance that opening foreign markets will result in FCC approval of foreign entry or investment.[22] At bottom, the Commission's approach is unlikely to motivate foreign countries to open up their markets.

C. The NPRM's "Effective Market Access" Test May Well Cause Retrenchment And Even Retaliation By Foreign Governments

In fact, the Commission's approach to leveraging open foreign markets is likely to be worse than ineffective: it may cause retrenchment and even retaliation by some foreign governments. That predictable reaction will severely undermine the NPRM's goal of opening foreign markets. It will also harm the interests of U.S. carriers and investors by further restricting their opportunities abroad.

[22] DT recognizes, of course, that the decision not to propose a more determinate approach to foreign market access is founded on several valid concerns, including (1) the desire to minimize the risk of retaliation by foreign countries (NPRM ¶ 49), (2) the recognition that a stricter "comparable market access" test as proposed by AT&T would be "impossible to meet, and thus would not encourage open markets" (NPRM ¶ 41), and (3) the recognition that an exclusive focus on foreign market access would not be consistent with Congress's directive that the Commission consider "the present or future public interest and necessity" in making decisions under Section 214 (see NPRM ¶ 41). DT agrees with the Commission that these reasons foreclose adoption of a stricter approach (including AT&T's "comparable market access" test), but that does not rescue the approach proposed by the Commission.

To begin with, it seems likely that at least some foreign countries will react negatively to the Commission's initiative. As the Chief of the FCC's International Bureau recently observed, foreign governments already

> view the current Section 310 as closing the U.S. market to their companies. Section 310 has become a metaphor for a closed U.S. market. It has become an excuse to go slowly on embracing competition and opening foreign markets to U.S. competitors. At international gatherings or bilateral discussions, the United States is routinely criticized for Section 310.

Testimony of Scott Blake Harris, Chief of the International Bureau, Federal Communications Commission, on Foreign Ownership Restrictions, Hearings Before the Committee on Commerce, Science and Transportation, United States Senate, at 5 (March 21, 1995) (emphasis added). If foreign countries already seize upon Section 310 as an excuse to resist greater market liberalization, then the Commission's proposed policy initiative surely will be invoked as an additional reason to oppose pro-competitive reforms.

This is true even if the "effective market access" requirement is only one of numerous factors to be considered by the Commission in deciding whether to grant approvals. While the Commission's nuanced approach may be a laudable effort to "avoid sending a signal" that the United States is "closing [its] markets" (NPRM ¶ 49), the fact remains that foreign reactions will depend as much on perception as on reality. In the relations among nations, symbolism is very important. Regardless of how variegated and subtle the Commission's balancing of factors will be, this initiative will regarded by many as establishing an additional barrier to entry. As Scott Harris so aptly put it, some foreign governments will see it as "a metaphor for a closed U.S. market."

In addition, some aspects of the proposed inquiry are almost certain to foster resentment abroad, whether or not they are only one part of a multi-factor analysis. For example, the Commission proposes to assess "whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards" in the foreign country. NPRM ¶ 40. In other words, the Commission intends to tell other countries whether their telecommunications regulators are competent and capable of ensuring competition. From the perspective of another country, a more intrusive and offensive inquiry is difficult to imagine.

Even more troubling is the prospect of retaliation by foreign countries, which would directly impede the goal of opening foreign markets. For example, countries that now impose no or few restrictions on U.S. investment might enact provisions similar to Section 310 setting limits on foreign ownership. Although the FCC proposal appears to grandfather existing foreign investments, other foreign countries may be prompted to scrutinize already existing U.S. investments in their countries. In Germany, for example, this would affect U.S. participation in personal communications services (PCS) and cellular consortia (including such U.S. companies as BellSouth and Air Touch). Alternatively, foreign countries might await denial by the FCC of a specific transaction and then single out one or more U.S. carriers for retaliation.

At a minimum, the Commission should anticipate that at least some countries will impose analogous reciprocity requirements on U.S. carriers. Thus, a foreign country might deny permission to a U.S. carrier to enter the country's market or make an investment until the U.S. removes barriers to entry or investment that are not present in the foreign country. Here again, the German PCS and cellular markets (which are fully competitive and, like other German markets that have been opened to competition, have no limits on foreign investment) provide a telling illustration. If Germany had imposed a reciprocity rule on U.S. carriers when awarding cellular licenses, several U.S. companies would have been denied permission to make the investments they have made in cellular consortia. Similarly, foreign countries that have opened their local services markets to full competition might deny entry into that market to some U.S.

regional Bell operating companies ("BOCs") on the ground that their "primary markets" are not fully liberalized.[23]

Indeed, another country could invoke reciprocity as a lever to spur reforms in the United States. Since every country has its own telecommunications policy goals and sensitivities about undesirable market characteristics, it is difficult to anticipate all the various ways that reciprocity could be applied to the detriment of U.S. firms. One example should suffice, however, to illustrate the serious risks to U.S. interests. Under settled principles of German competition law, serious concerns arise whenever a single firm engages in both (1) the provision of telecommunications services and (2) the manufacture of network equipment (such as switches). For that reason, the German Ministry of Post and Telecommunication's selection criteria for cellular licensees called for a lower ranking of candidates that were involved in both businesses. If Germany were to adopt a principle of reciprocity reflecting this traditional concern, it conceivably might be pressed to exclude, for example, all U.S. carriers with such manufacturing operations.

In sum, DT submits that the proposed "effective market access" requirement will be at best ineffective and at worst counterproductive. If so, the policy will only bar new competitors and capital infusions. This in turn will disserve the Commission's principle goal of "promot[ing] effective competition in the global market for communications services." NPRM ¶ 1, 21, 26.

D. The Commission's Goals Would Best Be Served By Continuing To Lead By Example And By Relying On Safeguards Where Necessary

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[23] The National Association of Regulatory Utility Commissioners reported that, as of August 1994, some thirty states did not allow competition in basic, switched, local service. National Association of Regulatory Utility Commissioners, <u>NARUC Report on the Status of Competition in Intrastate Telecommunications</u>, 203-206 (1994).

In marked contrast to the NPRM proposals, the Commission's present, encouraging attitude toward new investments and entry of new competitors is pro-competitive. Moreover, the Commission's strategy of addressing any possible risks of anticompetitive conduct through narrowly tailored safeguards (rather than barriers to entry), is sensible and has been hugely successful. The Commission has been an important factor in the trend toward greater competition abroad and in the global telecommunications markets, not by threatening to impose reciprocity, but through its leadership by example. More convincing than any economist's exposition, the U.S. example has demonstrated the tremendous benefits that competition brings to the telecommunications markets: greater innovation, better service, and lower price. DT submits that the Commission's goals would be best served by continuing on this path.

1. The United States Should Continue To Lead By Example

The FCC has exerted a powerful liberalizing influence abroad by stimulating competition in the United States. Competition in the U.S. has resulted in faster introduction of services and deployment of infrastructure than in most other countries, as well as in lower prices and better service. Nations that are following the U.S. lead — the United Kingdom ("U.K."), Canada, Australia, New Zealand, Sweden, and now Germany and other EU member states — have opted to follow the path of liberalization in no small measure because of U.S. success. These countries did not liberalize in response to pressure exerted by foreign governments.

DT submits that the FCC should continue to lead by example, by demonstrating to all the benefits of competition in the telecommunications sector. See Telefonica Larga Distancia de Puerto Rico, 8 FCC Rcd 106, 109 (1992) ("TLD") ("Our expectation is that the success of the U.S. experience will encourage other countries to liberalize their markets."); AmericaTel Corporation, 9 FCC Rcd 3993, 4001-02 (1994) ("AmericaTel") (same). An important part of such leadership should be a commitment to resist additional limitations on foreign ownership and investment in the U.S. market. Such restrictions are incompatible with the idea of a competitive market. Consistent with that stance, DT supports liberalization in Germany and opposes any limitations on foreign entry into German markets. Foreign investment in German telecommunications is welcome. No law, regulation or administrative practice establishes any limit on foreign ownership in German telecommunications. DT urges the FCC to adopt, wherever possible, these same open entry policies.

As the Commission is aware, Germany is in the process of privatizing DT and opening all markets to competition. The German market is liberalized in all areas except network infrastructure and public switched voice service, which will be opened to competition on January 1, 1998. See also pp. 49-51, infra (describing in greater detail recent developments in Germany and EU).[24] In pursuing these pro-competitive initiatives, German and EU authorities have looked to the United States' experience as a powerful argument for greater competition. As Federal Minister of Post and Telecommunications Wolfgang Boetsch recently explained, Germany hopes to "catch up, primarily to the United States" in the areas in which it lags behind this country in fostering competition in the telecommunications sector. Remarks of Dr. Wolfgang Boetsch, National Press Club, at 1 (Apr. 3, 1995). DT submits that the Commission should not now abandon its role as a leader in the worldwide trend toward greater competition.

2. The Commission Should Continue Its Current Approach Under Section 214 Of Relying On Safeguards Against Anti-competitive Conduct Where Necessary

The NPRM proposes to abandon the Commission's established approach to regulating foreign carrier entry into the U.S. international services market, namely, to rely on safeguards

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[24] In addition, the German government has recently announced an ambitious, pro-competitive blueprint for the regulatory regime that will govern full liberalization of network infrastructure and public switched voice services. See Key Elements of the Future Regulatory Framework in the German Telecommunications Sector (Mar. 27, 1995).

against anticompetitive conduct. In the past, the Commission consistently refused to take the more drastic step of imposing a reciprocity requirement because it could damage competition in the U.S. international services market by excluding new competitors and because any risk of anticompetitive conduct could be adequately controlled through more narrow safeguards. The NPRM provides no persuasive explanation of why the Commission's traditional use of safeguards is no longer sufficient to ensure competition, and there is none. The Commission should retain its traditional approach.

a. The Commission Has Previously Relied On Safeguards And Declined To Impose Market Access Requirements

In each of the four "significant cases" (NPRM ¶ 11) that the Commission has decided in recent years concerning foreign carrier entry into the U.S. international market (including through acquisition by a U.S. company of a foreign carrier with bottleneck facilities), the Commission was content to rely on safeguards against anticompetitive conduct. In Atlantic Tele-Network, Inc., 6 FCC Rcd 6529 (Com. Car. Bur. 1991) ("ATN"), review denied, 8 FCC Rcd 4776 (1993), appeal pending sub nom. Atlantic Tele-Network, Inc. v. FCC, No. 93-1616 (D.C. Cir.), the Commission approved the Section 214 application of ATN, a U.S. corporation that had acquired an 80% equity interest in the Guyana monopoly local service provider. ATN applied to provide facilities-based switched international service to Guyana. The Commission approved the Section 214 application notwithstanding a determination that ATN and its Guyana affiliate had the ability (which ATN had shown a willingness to employ) to "exclude new entrants to the U.S.-Guyana market and provide unequal interconnection for, or otherwise discriminate against, competing U.S. carriers." 6 FCC Rcd at 6531. Approval was predicated on the Commission's determination that (1) "entry by additional U.S. common carriers" such as ATN "into the U.S.-Guyana market will provide consumers additional choice * * * and be in the public interest," and (2) the risks of anticompetitive conduct could be controlled by the imposition of various reporting and other conditions as well as by the Commission's monitoring of ATN's compliance. Id. at 6529, 6531-32.

In TLD, the Commission allowed TLD, the Puerto Rican monopoly local services provider undergoing privatization, to transfer to an entity largely owned by the Spanish government, TLD's existing Section 214 and cable landing authorizations to provide resale and facilities-based international service between Puerto Rico, the U.S. Virgin Islands, and points overseas. Thus, as in ATN, TLD presented a situation where the entity controlling local bottleneck facilities in a foreign country also would control international facilities connecting the foreign country to the United States. In granting the application, the Commission acknowledged "the potential for discrimination among U.S. carriers terminating traffic" in Spain. 8 FCC Rcd at 108; see also id. at 109 (stating that "there remains some potential for foreign carrier affiliates to abuse there market power to the detriment of unaffiliated U.S. international carriers so long as competitive entry is not permitted in the home markets of those affiliated"). "The public interest," the Commission nevertheless explained, "does not necessarily require that we deny the facilities-based entry of a U.S. affiliate of a foreign carrier where, as here, it appears we can craft nondiscrimination safeguards sufficient to protect U.S. carriers in their provision of U.S. international service from discrimination that might occur as a result of such entry and the balance of public interests consideration weigh in favor of granting the applications." Id. at 109 (emphasis added). Accordingly, the Commission approved the applications while imposing various safeguards.

In AmericaTel, the Commission authorized transfer of control of Section 214 international authorizations for service between the U.S. and a variety of countries to ENTEL-Chile, a Chilean long distance carrier. Chile was liberalizing its telecommunications market;

ENTEL's long distance function had been divested from the local exchange carrier, CTC. Although competition in the Chilean long distance and international services market was developing, CTC still provided some 95% of all local services. In addition, Telefonica de Espana S.A. (Telfonica), the Spanish monopoly carrier, owned 20% of ENTEL and 43% of CTC (but had committed to divest itself of one of these holdings). In approving the transfer, the Commission adhered to its traditional approach by "examin[ing] the potential for discrimination against competing U.S. international carriers and the effectiveness of safeguards in preventing such discrimination" (AmericaTel, 9 FCC Rcd at 4000), a process that resulted in imposition of various reporting and nondiscrimination requirements. Id. at 4000-01, 4005. The Commission's favorable action was founded on its conclusion that the transfer would "lead to consumer benefits through increased competition in the U.S. telecommunications market." Id. at 4001; see also ibid. ("Competition fosters lower prices, innovative service and increased responsiveness to consumer needs, all of which in turn should help to stimulate economic growth in the United States.").

Finally, in the BT/MCI Declaratory Ruling, 9 FCC Rcd 3960 (1994) ("BT/MCI"), the Commission granted Section 310(b)(4) approval of a 20 per cent investment in MCI by British Telecom (BT), raising total foreign investment in MCI to 28 percent. The Commission expressly declined to consider a comparable market access standard in the context of a declaratory rulemaking proceeding; instead, it proceeded to "evaluate th[e] transaction in accordance with existing Commission precedent." 9 FCC Rcd at 3965. The Commission then reviewed in considerable detail the risks of anticompetitive conduct arising out of BT's acquisition of a 20% interest in MCI and the associated agreements, and concluded that these risks could be adequately addressed by conditions imposed either by the Department of Justice in a prior consent decree or by the Commission. Id. at 3961-65. The Commission imposed various conditions and declared the transaction to be in the public interest in view of the pro-competitive benefits it would bring. See id. at 3965-68. Thus, in every one of the four "significant cases" (NPRM ¶ 11) recently decided by the Commission, the Commission relied on safeguards against anticompetitive conduct.

Not only has the Commission consistently relied on effective safeguards rather than on barriers to entry, but it has expressly declined to require reciprocal market entry. In TLD, the Commission was asked to condition the transfer of the Puerto Rican monopoly provider's Section 214 authorizations to a Spanish-controlled company upon "reciprocal rights being granted to U.S. carriers in Spain." 8 FCC Rcd at 108. In rejecting this request, the Commission explained:

> This Commission has consistently sought to provide for open entry in the United States for carriers originating or terminating U.S. international voice or record carrier services as a means of encouraging competition in these services, and lower prices for U.S. consumers.

Ibid. The Commission added that the "long-term solution to foreign market power * * * is greater liberalization," and that over time "the success of the U.S. experience will encourage other countries to liberalize their markets." Id. at 109.

Similarly, in AmericaTel, the Commission declined to impose a comparable market access test on either Chile or Spain. See 9 FCC Rcd at 3995-96. In so doing, the Commission explained that in the past it had "examined applications filed by foreign carriers on a case-by-case basis, balancing our policy in favor of open entry against the potential for discrimination by a foreign carrier against unaffiliated U.S. carriers." Id. at 3996. The Commission reiterated its view, previously expressed in TLD, that the public interest "does not necessarily require that we deny the facilities-based entry of a U.S. affiliate of a foreign carrier where it appears that: (1) nondiscrimination safeguards are sufficient to protect U.S. carriers in their provision of U.S.

international service from discrimination that might occur as a result of such entry; and (2) the balance of public interests considerations favors granting the application." Ibid. In that situation, the Commission's policy "to promote open entry" and "to encourage[] competition * * * in order to foster lower prices and increased service choices for U.S. consumers," necessitated that permission be granted. Ibid.

b. The Commission Has Offered No Persuasive Reason To Abandon Its Current Approach

As just explained, the Commission on several occasions has permitted foreign carriers with monopoly power in their home markets to enter the U.S international services market. In those rulings, the Commission did not impose market access requirements, but relied on detailed safeguards. The Commission's actions in these cases were largely motivated by an awareness of the general pro-competitive impact of new entry and new investment. The NPRM does not dispute that as a general matter "entry of foreign carriers into the U.S. international market [is] procompetitive" (NPRM ¶ 28), nor does the NPRM suggest that the Commission is proposing to alter its longstanding approach.

DT submits that the reasons given in the NPRM for this significant change in policy are wholly unsatisfactory. At the outset, the Commission states that "[c]losed foreign markets preserve the market power of foreign entities in their home markets." NPRM ¶ 22. While true, this observation is hardly a proper basis for action by the Commission. It goes without saying that the Commission lacks authority to regulate telecommunications services in wholly foreign markets.[25] Next, the Commission observes that such closed foreign markets "may inhibit competition in the provision of global communications services." Ibid. (emphasis added); see

[25] Elsewhere in the NPRM, the Commission invokes concern about the welfare of foreign consumers in markets abroad as a rationale for this rulemaking. See NPRM ¶ 21, 29, 31.

also id. at ¶ 23 ("[C]urrent policies * * * may not adequately address questions of market access, undue discrimination and potential anticompetitive effects that arise in today's evolving telecommunications markets * * * ") (emphasis added). Such tentative observations are an insufficient ground to change a longstanding policy. In addition, they do not answer the fundamental question why a policy change is necessary or desirable.

The NPRM states that the new policy will further the overarching goal of "promot[ing] effective competition in the global market for communications services." NPRM ¶¶ 1, 26. As previously explained, however, the subsidiary goal of attempting to leverage open foreign markets through the proposed "effective market access" test will in all likelihood undercut rather than promote competition. Indeed, the NPRM recognizes that "entry of foreign carriers into the U.S. international market would be procompetitive," but cautions that this is true only "[i]n a truly competitive global market." NPRM ¶ 28. The NPRM then offers the following explanation:

> [B]ecause global competition remains highly asymmetric, unrestricted entry by foreign carriers from closed markets into the open U.S. market has the potential to inhibit competition, particularly with respect to the provision of global communications services to high-end users such as multinational companies. For instance, a foreign carrier would be able to acquire 1+ access to U.S. consumers and hold itself out as a ubiquitous provider of U.S. international services while U.S. carriers could not make the same representations in the foreign carrier's home market. In addition, such a carrier would be able to offer its customers benefits such as lower costs and faster provisioning of services provided between its closed markets and the United States.

NPRM ¶ 28 (emphasis added). Putting aside the tentative quality of the foregoing conclusions, the NPRM fails to explain why the "potential" identified is something that should concern the Commission. If that potential can be adequately addressed by safeguards, there is no basis for concern. Nor does the Commission explain why the examples it gives (which in any event relate to advantages purportedly gained in the foreign market) could not be adequately addressed through traditional safeguards.

Equally unconvincing is the NPRM's statement that the Commission's current approach is too indeterminate and thus provides insufficient certainty for foreign investors. NPRM ¶ 23-24. As previously explained, the multi-step, multi-factor inquiry proposed by the NPRM is anything but certain. It provides not more but less certainty for foreign investors. And contrary to the NPRM's suggestion, it would not dispense with the need to conduct a case-by-case inquiry into the conditions of the foreign market, the circumstances of the proposed deal, or both. Its very adoption, in DT's view, will chill investment in the United States. In summary, the NPRM does not give a compelling reason to abandon current policy.

III. THIS RULEMAKING IS UNTIMELY

Quite apart from the Commission's lack of authority to impose an "effective market access" test, or the wisdom of such a decision, this proceeding is untimely. There are at least three reasons why this is so. First, Congress is now debating comprehensive reforms to the Nation's telecommunications laws, including provisions that would amend Section 310 as well as alter the scope of this Commission's delegated authority to consider factors such as "effective market access". Second, the United States is currently engaged with other countries in multilateral negotiations concerning trade issues relating to the telecommunications sector (and has agreed not to take steps to increase its leverage at the bargaining table). And third, the EU in general (and Germany, its largest and most important telecommunications market, in particular) are in the midst of an ambitious reform program aimed at privatizing the traditionally state-owned Post, Telegraph and Telephone organizations and opening up telecommunications markets to far greater competition. In view of these developments, the Commission should terminate or at least postpone this proceeding.

A. Congress Is Currently Considering Amendments To Section 310(b) That Would Affect The Commission's Authority To Consider "Effective Market Access"